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Supreme Court of the United States

No. A-161

HOWARD SCOTT,

Petitioner

v.

AVON PRODUCTS, INC., et al.

ORDER

UPON CONSIDERATION of the application of the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is nereby, extended to and including October 25th, 1993.

/s/ David H. Souter
Associate Justice of the Supreme Court of the United States

Dated this 18th
day of August, 1993.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-2115

THE FABALON COMPANY, INC., et al.
HOWARD L. SCOTT,

Appellant

vs.

AVON PRODUCTS, INC., et al.

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge,* BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH and LEWIS, *Circuit Judges.*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Carol Los Mansmann
Circuit Judge

Dated: May 28, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

March 10, 1993
#C-91

Nos. 92-2090, 92-2115

THE FABALON COMPANY, INC., et al.

v.

AVON PRODUCTS, INC., et al.
The Fabalon Company, Inc., et al, Appellants in 92-2090
Howard L. Scott, Appellant in 92-2115
(E.D. of Pa. Civil No. 91-05015 (JTG))

Present: MANSMANN, COWEN and ROTH,
Circuit Judges.

1. Clerk's submission for possible dismissal due to a jurisdictional defect.
2. Motion by Appellees Avon Products, Inc. and Giorgio of Beverly Hills in 92-2090 to dismiss the appeal for lack of jurisdiction, *and* for sanctions against Appellants and Counsel for Appellants for filing a frivolous appeal, *and* for just damages, including, but not limited to attorneys' fees and double costs pursuant to FRAP 38.
3. Motion by Appellees Avon Products, Inc. and Giorgio of Beverly Hills in 92-2115 to dismiss the appeal for lack of jurisdiction, *and* for sanctions.
4. Motion by Appellees United Guardian, Inc., Freeman Industries, Inc., and Marubeni America Corporation in 92-2115 to dismiss the appeal *and* for sanctions.
5. Motion by Appellants in 92-2090 to vacate the Clerk's Order of 2/24/93 allowing the Appellees to file their briefs within ten (10) days of the date of the order referring the jurisdictional issue to the

merits panel, and to maintain the Briefing *and* Scheduling Order of 1/6/93.

Deputy Clerk 597-1092

No Briefing Schedule established in Pro Se Appeal at *92-2115.*

ORDER

The foregoing motions are decided as follows:

1. The appeals are dismissed for lack of jurisdiction of the merits and for mootness of any remaining issue regarding removal of an attorney from a closed case.

2-3-4. These motions by appellees for dismissal *and* sanctions are granted insofar as they seek dismissal and denied insofar as they seek sanctions.

5. The motion by appellants to vacate is denied as moot.

By the Court,

/s/ Carol Los Mansmann

Circuit Judge

Dated: APR 28 1993

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

(As amended Apr. 2, 1982, Pub.L. 97-164, Title I, § 124, 96 Stat. 36.)

HISTORICAL AND STATUTORY NOTES

1982 Amendment

Pub.L. 97-164 provided that the jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Effective Date of 1982 Amendment

Amendment by Pub.L. 97-164 effective Oct. 1, 1982, see section 402 of Pub.L. 97-164, set out as a note under section 171 of this title.

Termination of United States District Court for the District of the Canal Zone

For termination of the United States District Court for the District of the Canal Zone at end of the "transition period", being the 30-month period beginning Oct. 1, 1979, and ending midnight Mar. 31, 1982, see Paragraph 5 of Article XI of the Panama Canal Treaty of 1977 and sections 3831 and 3841 to 3843 of Title 22, Foreign Relations and Intercourse.

Legislative History

For Legislative history and purpose of Pub.L. 97-164, see 1982 U.S. Code Cong. and Adm. News, p. 11.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE FABALON COMPANY, INC. et al	:	CIVIL ACTION NO.
v.	:	
AVON PRODUCTS, INC., et al	:	91-CV-5015

ORDER

AND NOW, this 29th day of May, 1992, the Entry of Appearance Pro Hoc Vice of Vernita C. Williams, Esquire, for the purpose of this action only pursuant to Local Rule 13 is confirmed. Entry is on behalf of plaintiff.

_____

J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE FABALON COMPANY, INC. et al	:	CIVIL ACTION NO.
v.	:	
AVON PRODUCTS, INC., et al	:	91-CV-5015

ORDER

AND NOW, this 2nd day of April, 1992, it is hereby ORDERED that plaintiff's complaint is DISMISSED as to defendant Marubeni America Corporation, with whom plaintiff has reached a settlement.

BY THE COURT:

_____

J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE FABALON, COMPANY, INC.	:	CIVIL ACTION
v.	:	
AVON PRODUCTS, INC.	:	NO. 91-5015

ORDER

AND NOW, this 13th day of July, 1992, it is hereby ORDERED that (1) paragraph two of this court's order dated July 7, 1992, is VACATED, (2) the motions to dismiss (docketed as Nos. 71 and 72) filed by defendants United Guardian, Inc. ("United Guardian") and Freeman Industries, Inc. ("Freeman") are GRANTED, and (3) defendants United Guardian and Freeman are DISMISSED, for the reasons which follow:

1. The court initially granted United Guardian's motion to dismiss for lack of personal jurisdiction in an order dated November 7, 1991. That order was vacated in an order dated March 10, 1992, in which the court also denied Freeman's motion to dismiss for lack of personal jurisdiction. The order to vacate was entered based upon the parties' representation that they were close to settling their dispute. Defendants consented to the jurisdiction of this court solely for the purpose of effecting a binding settlement agreement.

2. As time passed, however, the settlement process bogged down, due primarily to plaintiffs' unwillingness to finalize settlement. At a conference held on April 22, 1992, the court ordered that defendants re-file their motions to dismiss, which they did on May 4, 1992. Soon thereafter new counsel made an appearance for plaintiffs, causing some delay. Plaintiffs did not file responses to defendants' motions to dismiss until June 24, 1992.

3. In the conference held on June 29, 1992, plaintiff's (original) counsel once again referred to the earlier-proposed settlement with defendants. The court stated

that it would give the parties two days, until July 1, 1992, to finalize the settlement, or that, "[o]therwise, judgment will be entered in favor of the defendants as a sanction" against plaintiffs, who had failed to cooperate in settlement negotiations. Transcript at 8. The court issued a subsequent memorandum and order on July 7, 1992. In that order the court gave plaintiffs the benefit of the doubt and presumed that they had reached a settlement as ordered in the June 29 conference. The court accordingly dismissed United Guardian and Freeman and retained jurisdiction to enforce the terms of the settlement.

4. Defense counsel have now reported, in a letter dated July 7, 1992, that, as of that date, plaintiffs had made no effort to contact them to consummate the proposed settlement. As of this date plaintiffs have not responded to said letter. While the court is fully empowered to impose the sanction referred to in the June 29 conference, such a sanction is unnecessary in light of the pending motions to dismiss filed by United Guardian and Freeman. Upon review, the court has determined that these motions should be granted and that defendants should be dismissed for lack of personal jurisdiction.

5. This court incorporates by reference the order dated November 7, 1991, in which it granted United Guardian's first motion to dismiss for lack of personal jurisdiction. Plaintiff's response to the (second) motion to dismiss adds nothing new to the analysis. As stated in the November 7 order, plaintiffs have provided no evidence that United Guardian's Pennsylvania contacts are of a "continuous and substantial" nature such that this court could exercise general jurisdiction over United Guardian. *Provident National Bank v. California Federal Savings & Loan Association,* 819 F.2d 434, 437 (3d Cir. 1987).

6. Nor is there any evidence that United Guardian has subjected itself to this court's specific jurisdiction by

"purposefully avail[ing] itself of the privilege of conducting activities within [Pennsylvania], thus invoking the benefits and protections of its laws." *Hanson v. Denckla,* 357 U.S. 235, 253 (1958). The complaint alleges, at most, that United Guardian sold perfluorocarbon resins to Avon for use in Avon Banishing Cream and sold Lubraslide, containing the same resins, to Freeman Industries. However, there is no evidence whatsoever that such sales occurred in Pennsylvania, nor that United Guardian specifically intended that Avon Banishing Cream or Lubraslide be sold in Pennsylvania.

7. Nor is Freeman subject to this court's general or specific jurisdiction. As with United Guardian, there is no evidence that Freeman conducts "continuous and substantial" business within the forum. *Provident National Bank v. California Federal Savings & Loan Association,* 819 F.2d 434, 437 (3d Cir. 1987). Instead, the affidavit of Joel Freeman establishes that Freeman does little (if any) business in Pennsylvania.

8. Plaintiffs base their argument for specific jurisdiction on (1) a set of three documents sent to a potential customer in Pennsylvania regarding an allegedly infringing product and (2) two Freeman labels with Pennsylvania addresses on them. The proffered set of documents testifies only as to one, isolated advertisement, and does not testify as to any sale of a Freeman product. As for the labels, there is no evidence as to where they came from or as to the product(s) contained in packages to which they were affixed. Such scant evidence is insufficient to establish specific jurisdiction.

BY THE COURT:

_____

J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE FABALON, COMPANY, INC.	:	CIVIL ACTION
v.	:	
AVON PRODUCTS, INC.	:	NO. 91-5015

ORDER

AND NOW, this 7th day of July, 1992, it is hereby ORDERED that:

1. Defendants' motions to dismiss or for summary judgment (docketed as Nos. 65, 67, and 68) are GRANTED, and summary judgment is ENTERED against plaintiffs and in favor of defendants Avon Products, Inc., Giorgio of Beverly Hills, Inc., and Macsil, Inc. Macsil, Inc.'s motion for sanctions and attorney's fees is DENIED.

2. Defendants United Guardian, Inc., and Freeman Industries, Inc., are DISMISSED pursuant to the conference held June 29, 1992, at which time the court ruled that it would enforce the settlement agreement previously entered into between plaintiffs and those defendants. The court retains jurisdiction to enforce the terms of said settlement.

3. This order having resolved the case as to all plaintiffs and defendants (defendant Marubeni, Inc., having previously been dismissed from the case), this matter is marked CLOSED.

BY THE COURT:

_____

J.

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL,	:	No. 8 DB 91
Petitioner	:	Attorney Registration No. 32276
v.	:	
GREGORY H. WHEELER	:	Philadelphia County
Respondent	:	

REPORT OF HEARING COMMITTEE 1.09

Brief Summary of All Charges

This matter was before Hearing Committee 1.09 on a Petition for Discipline filed with the Disciplinary Board of the Supreme Court of Pennsylvania on September 13, 1991 and served on Respondent Gregory H. Wheeler on September 25, 1991. The Petition contained six charges, but Charge V was dismissed at the hearing on December 12, 1991 upon the motion of the Office of Disciplinary Counsel. (N.T. I 13)[1]

In Charge I, the matter of Allen W. Frasier, and Charge II, the matter of Elizabeth Cole-Sampson, Respondent Wheeler was charged with failing to appear on two occasions for scheduled informal admonitions. In Cole-Sampson, Mr. Wheeler was also charged with failing to comply with a condition of the administration of the informal admonition.

In Charges III, IV and VI, Respondent Wheeler was alleged to have engaged in professional misconduct in the course of his representation of three clients, respectively, Dean Chacker through his representative Marlene Brandwein, George Parker and Samuel Ellison. The more specific charges with regard to each Charge are set forth in the remainder of this Report.

---

1. "N.T. I" followed by a number refers a page in the Notes of Testimony or Transcript of the hearing held on December 12, 1991.

Respondent did not file an Answer to the Petition for Discipline. A prehearing conference was scheduled for November 18, 1991. At that conference Mr Wheeler made a motion for a continuance to enable him to retain counsel. A fifteen-day continuance was granted. At the continued prehearing conference on December 3, 1991, Mr. Wheeler appeared without counsel. The remainder of the proceedings were conducted with Mr. Wheeler acting as his own attorney.

The deposition of Robert H. Davis, Jr. Acting Chief Disciplinary Counsel was held on December 10, 1991. Hearings on the matter were held on December 12, 1991 and December 19, 1991. The record was held open until December 23, 1991 to allow Respondent additional time to produce documentary evidence in his defense. Respondent declined to do so and the record was closed. On February 19, 1992, the Office of Disciplinary Counsel filed a brief. Respondent did not file a brief.

On April 8, 1992, the hearings were reconvened to receive evidence on the issue of the type of discipline to be imposed pursuant to Disciplinary Board Rule §89.151(a). A second hearing on the type of discipline was held, pursuant to a continuance by the Disciplinary Board, on May 12, 1992 to allow Respondent to bring additional evidence. The Office of Disciplinary Counsel filed a Memorandum of Law on the type of discipline to be imposed. Respondent did not file a memorandum of law.

The Hearing Committee makes the following conclusions. In regard to Charges One and Two, the Committee finds that Mr. Wheeler willfully failed to appear before Disciplinary Counsel for informal admonition. In regard to Charge II, the Committee further finds that Mr. Wheeler failed to comply with conditions attached to an informal admonition.

In regard to Charges III, IV and VI, the Committee finds that Respondent has violated certain of the Pennsylvania Rules of Professional Conduct and certain provisions of the former Pennsylvania Code of Professional

Responsibility as more fully explained in the remainder of this Report.

As to the disposition of this case, the Hearing Committee recommends that Respondent be suspended for one year and one day with certain conditions of reinstatement as described at the end of this report.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

THE FABALON COMPANY, INC., ET AL.,	)	CA 91-5015
	)	Philadelphia, PA
Plaintiffs,	)	June 29, 1992
	)	9:22 A.M.
v.	)	
	)	
AVON PRODUCTS, INC., ET AL.,	)	
Defendants.	)	

TRANSCRIPT OF PRETRIAL CONFERENCE
BEFORE THE HONORABLE JAMES T. GILES
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs:	GREGORY H. WHEELER, ESQ. 600 Upland Avenue Upland, PA 19015
For the Defendants:	ALAN H. BERNSTEIN, ESQ. ROBERT S. SILVER, ESQ. 1635 Market Street Philadelphia, PA 19103 For Avon and Georgio
	BRADLEY K. MOSS, ESQ. 1735 Market Street Philadelphia, PA 19103 For Macsil
Audio, Operator:	DAVID T. HAYES
Transcribed by:	DIANA DOMAN TRANSCRIBING P.O. Box 67 Audubon, NJ 08106 (609) 547-2506

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

(Call to Order of the Court.)

THE COURT: Good morning.

COUNSEL: Good morning, Your Honor.

THE COURT: Please be seated. State your appearances for the defense please.

MR. BERNSTEIN: Alan Bernstein. I'm here in a dual role, Your Honor. I'll explain why. I'm first of all here for my regular clients Avon and Georgio of Beverly Hills. I received a telephone call from Mr. Battersby, the attorney for United Guardian and Freeman and Marubeni, and they had a personal problem up there, and he asked me for this one hearing to stand in for them. So today Mr. Silver and I are representing five of the six defendants.

THE COURT: Thank you.

MR. MOSS: I represent the last defendant. My name is Bradley K. Moss, and I represent defendant Macsil, Inc. That's M-A-C-S-I-L.

THE COURT: I've spoken to the plaintiff's attorney who is out of town and is not going to be here today. What are we to accomplish today?

MR. BERNSTEIN: This was a regularly scheduled status conference in your April 22, 1992. At the last status conference which I believe was in late April, Your Honor had issued a strong statement that you felt that there should be a round of dispositive motions if the parties so desired. You issued a very strict briefing schedule. All of the defendants complied with that briefing schedule filing briefs within seven days or ten days, and the plaintiff's attorney has not filed — had not filed a brief in opposition until late last week, probably well over a month late. I know you issued orders giving extensions of time which we had opposed, and that's where we stand. Those summary judgment motions are pending before you.

MR. MOSS: Your Honor, in particular, with respect to defendant Macsil, you had directed that I take and we did take the deposition of the plaintiff's alleged expert.

That deposition was taken shortly after our last conference. At our last conference, you said that if the expert was not able to provide the defendant of evidence, some evidence, that there was in fact in this case Teflon in the product, any of our products, that you would look very favorably upon a motion for summary judgment. We did take that deposition. I have filed on, April 29th a motion for summary judgment. That expert could not identify in my client's product Teflon with polyfluorocarbons (sic). He so stated in his deposition. I then also went out and got my own expert, Your Honor, whose affidavit is also part of the motion for summary judgment who says that based on his research, there is no poly – no Teflon in my products – in my client's product. At this time, I would hope that we might be in a position to rule on a motion for summary judgment. In the interim, Your Honor, we also. . .

THE COURT: Excuse me. Do you have an affidavit from your client. . .

MR. MOSS: Yes, Your Honor.

THE COURT: . . . stating that as your product was designed, it does not contain the accused products?

MR. MOSS: Yes. That's Exhibit E, Your Honor, Exhibit E to my motion. It says, "The only ingredients in Balmex are. . ." Then he goes on and states what they are, and that's paragraph three. Paragraph four says, "Poly – excuse me – perfluorocarbon resins, commonly known as Teflon, are not used in making Balmex." So, yes, I do have that affidavit drawn. We also had a change of counsel or an addition – here's Mr. Wheeler. We also had an addition of counsel in the interim. Counsel has now noticed my client's deposition and was also served some requests for production of documents. I would hope that if my motion is granted, there would not be the need for my client's deposition or to respond to the request for production of documents, although with respect to the request, Your Honor, I've gone through it with my client, and a response would be rather easy because there are no documents showing

that Teflon is — or whatever you want to call it is in my client's product.

THE COURT: What is the basis of your motion for summary judgment?

MR. BERNSTEIN: Your Honor, we had an affidavit similar to the affidavit that Mr. Moss' client had. Our affidavit shows that at most my client's product contained what we call 100 parts per million of Teflon. That is a fraction of one over a thousand, a very minute amount which our affidavit states specifically is not a significant amount of Teflon, and it's not even Teflon. It's fluorine which could have crept in from the water that's used in testing and minute impurities in the materials. There's no establishment of Teflon at all, and on that basis, our expert stated that the small amount of fluorine ion, as we call it, is not significant.

THE COURT: Is there any counter evidence?

MR. BERNSTEIN: There is no counter evidence. Furthermore, there are about four or five other counts in the complaint, conspiracy, RICO, which are totally baseless and which there is no counter evidence on that. I would like to say this. If Your Honor should deny any aspect of our summary judgment motion — in other words, there's five counts of the complaint. Let's say Your Horror should grant the motion as to four, and maybe as to the fifth, for some reason, you feel you can't grant it. I would ask the Court to hold another hearing like this within two or three weeks after that so that we can see where this case is going. Obviously, the pendency of the summary judgment motions has put a total end to discovery because it's our position that there's nothing more to the case and the case should be ended. So there's nothing happening until we have your decision, and what I'm asking you to do is if you would please set a hearing like this about two weeks after your decision so we can see what we're going to do with whatever is left in the case. Now, for my mind, my feeling is that if Your Honor for some reason does not grant summary judgment as to the patent count, that

there ought to be a neutral testing company selected to run tests here because you can't see minute amounts of fluorine in a mix. We have their test which was not – as we pointed out in our moving paper, which was not an appropriate and sufficiently analytical test. You have our test which we believe is proper, but if for some reason you feel that the case has to go on, then I strenuously submit that we should talk about appointing a neutral expert because my client doesn't have fluorine, doesn't need fluorine, and has none of the benefits of fluorine or Teflon in any of its products. Thank you.

THE COURT: Mr. Wheeler?

MR. WHEELER: Your Honor, excuse my delay. I got caught on the bridge, but as to the defendant, Mr. Moss' client, I have – Macsil, I'm sorry. I have advised my client that I felt after receiving all of the information, that I thought that Macsil should no longer be held in this case for a number of reasons. I have advised that as to some of the other defendants, there should be also a partial release. As to Avon, I believe there is sufficient evidence to continue this matter on the patent counts. As you know, there has been. . .

THE COURT: Excuse me. As to which defendants are you conceding judgment?

MR. WHEELER: As to Macsil, I have advised my client that I felt that they should not be in the case any longer at this point. As to. . .

THE COURT: Well, what are you telling me? Are you telling me that you've advised your client or are you trying to advise the Court?

MR. WHEELER: Well, I have advised my client. As you know, there has been this introduction of new counsel at some point. I have not had . . .

THE COURT: Well, Counsel, if you don't see any basis to proceed, I will grant the motion for Macsil.

MR. WHEELER: I have also advised that as to the defendant Georgio, I felt that they should no longer be in the case.

THE COURT: Georgia will also be out, is out. Who else?

MR. WHEELER: United Guardian is not here today.

MR. BERNSTEIN: You don't know. I'm representing them just for this meeting.

MR. WHEELER: I see, okay. And I have advised that as I did at the last hearing, that we should go with the original settlement agreement on the two products which were obviously infringement patents and that . . .

THE COURT: United Guardian is settled?

MR. WHEELER: Well, we had entered into settlement negotiations and reached a settlement in principle. My client had never signed the actual settlement papers. The Court . . .

THE COURT: Has he signed the papers?

MR. WHEELER: No, he has not.

THE COURT: Why not? He's directed to by Wednesday of this week. Otherwise, I'll enter a judgment in favor of those defendants. I mean this is very plain, very simple, because his action is contemptuous. I'll give him a chance to resolve it. Otherwise, judgment will be entered in favor of the defendants as a sanction. And which defendants are they?

MR. WHEELER: That's United Guardian. Marubeni, there had already been a settlement in our last record I believe. They're out of the case.

THE COURT: Has the agreement been signed by your client?

MR. WHEELER: I don't believe so.

THE COURT: The same ruling applies.

MR. WHEELER: All right.

MR. BERNSTEIN: How about Freeman?

MR. WHEELER: Freeman was covered by the United Guardian. I'm sorry. They were a defendant, but they were covered by the United Guardian settlement.

MR. BERNSTEIN: Let me ask you this. As to Avon, there are Counts 2 to, whatever, 6 of the complaint, conspiracy, RICO, fraud. Are they also out of the case now?

MR. WHEELER: I have not discussed that with my client. I would be willing to discuss that and consider dropping those counts. Also, as to the appointment or the use of a neutral expert, I believe we had agreed to that at the last hearing.

MR. BERNSTEIN: Right, right, right.

THE COURT: We're not at that point. We're at a point whereas to pending motions, I have to resolve the matter based upon the principles applicable to analyzing such motions.

MR. BERNSTEIN: There's no evidence as to fraud and conspiracy and RICO at all, and I submit that they should be dismissed from the case also as to Avon.

MR. WHEELER- Well, I'm just saying I have not discussed it with my client at all on those particular – as to Avon.

THE COURT: Well, what arguments have you made if any counter to the motion to dismiss or the motion for summary judgment as to those counts?

MR. WHEELER: Well, there have been no arguments submitted thus far, Your Honor.

MR. BERNSTEIN: Your Honor, Ms. Williams did file a brief. We got it on Friday.

THE COURT: What evidence is there?

MR. BERNSTEIN: And there is none; there is no evidence.

THE COURT: Then those motions will be granted as to those counts.

MR. BERNSTEIN: Thank you.

THE COURT: As to Avon, Mr. Wheeler, what evidence is there counter to the evidence submitted by Avon that analysis shows one part in a million with respect to fluoride – fluorine?

MR. WHEELER: Well, the evidence I believe . . .

THE COURT: And no Teflon.

MR. WHEELER: The evidence is the patents themselves, number one. The patents involved only call for a minute amount of the material to be in it to make it effective.

THE COURT: Well, what evidence is there that this amount would make it effective?

MR. WHEELER: That's what I'm saying. The patents themselves call for merely minute amounts such as that.

THE COURT: Well, very minute has to be defined. Now, their expert said that one part in a million is not significant.

MR. WHEELER: One of the things our expert has said that – because we specifically questioned whether that amount of fluorine that was found in the products could be caused by water or anything else. And he said absolutely not because if the water had that much fluorine in it, it would be dangerous to human beings for drinking purposes and otherwise. SC, it wouldn't be caused by water or anything else in there.

THE COURT: Well, that's not an explanation. That doesn't satisfy me that it could riot have been. There's plenty of water around that's called dangerous to drinking. . .

MR. WHEELER: Well, what I'm saying . . .

THE COURT: . . . that's nevertheless drunk.

MR. WHEELER: When I say dangerous, he said fatal. You couldn't have that. The amount in drinking water and water, the tap is much less than that one per thousand.

THE COURT: One per million or one per thousand?

MR. WHEELER: One per thousand I believe it was.

MR. BERNSTEIN: By arithmetic that's a thousand per million? One per thousand? You add three zeroes. That's a thousand per million.

THE COURT: A thousand per million or is one in a thousand.

MR. WHEELER: Yeah.

THE COURT: So a thousand parts per millior, is – and do you have an affidavit that says that that amount would be significant for purposes of. . .

MR. WHEELER: I don't have art affidavit . . .

THE COURT: Okay. That's the basis upon which I will analyze it, whether or not it would be significant for purposes of the chemical reactors which you claim is patented. If it's not significant, then, – chemically, if it's not significant, then you can't claim patent infringement because the benefit that you claim for your patent could not be replicated through the Avon product. Is there anything else? Thank you very much. A decision will be made on this in the next two weeks.

MR. WHEELER-. Thank you, Your Honor.

THE COURT: Now, you had requested – well, inasmuch as Mr. Moss' client is no longer in the case, your request to take the deposition of the principal is mooted.

MR. WHEELER: Thank you very much.

MR. MOSS: Your Honor, will you be issuing just an order?

THE COURT: Yes.

MR. MOSS: Thank you, Your Honor.

THE COURT: Thank you.

CERTIFICATION

"I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter."

_____

Kathleen Nazarok

Date: July 7, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE FABALON COMPANY, INC., FABALON LABORATORIES, INC., FABALON, INC., HOWARD L. SCOTT, THE KAREN AND WENDY SCOTT TRUST, THE FIRST FOUNDATION, CHARLES N. WRAGG, JR. and BEVERLY L. WRAGG	: CIVIL ACTION
v.	:
AVON PRODUCTS, INC., UNITED GUARDIAN, INC., FREEMAN INDUSTRIES, INC., MARUBENI AMERICA CORPORATION, GIORGIO OF BEVERLY HILLS, and MACSIL, INC.	: NO. 91-CV-5015

MEMORANDUM OF LAW OF DEFENDANT MACSIL, INC. IN OPPOSITION TO PLAINTIFFS' MOTION TO REMOVE GREGORY H. WHEELER

Defendant Macsil, Inc., by and through its counsel, submits this memorandum of law in opposition to plaintiffs' motion to remove Gregory H. Wheeler. For the reasons set forth in the memorandum of law of defendants Avon Products, Inc. and Georgio of Beverly Hills, plaintiffs' motion should be denied and the Clerk's office should be notified not to accept any further filings in this matter unless they are first approved by the court.

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filed in the district court that designated parts of the record shall be retained in the district court unless thereafter the court of appeals shall order or any party shall request their transmittal. The parts thus designated shall nevertheless be a part of the record on appeal for all purposes.

(g) *Record for preliminary hearing in the court of appeals.* — If prior to the time the record is transmitted a party desires to make in the court of appeals a motion for dismissal, for release, for a stay pending appeal, for additional security on the bond on appeal or on a supersedeas bond, or for any intermediate order, the clerk of the district court at the request of any party shall transmit to the court of appeals such parts of the original record as any party shall designate.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986.)

Rule 12. Docketing the appeal; filing of the record

(a) *Docketing the appeal.* — Upon receipt of the copy of the notice of appeal and of the docket entries, transmitted by the clerk of the district court pursuant to Rule 3(d), the clerk of the court of appeals shall thereupon enter the appeal upon the docket. An appeal shall be docketed under the title given to the action in the district court with the appellant identified as such, but if such title does not contain the name of the appellant, the appellant's name, identified as appellant, shall be added to the title.

(b) *Filing the record, partial record, or certificate.* — Upon receipt of the record transmitted pursuant to Rule 11(b), or the partial record transmitted pursuant to Rule 11(e), (f), or (g), or the clerk's certificate under Rule 11(c), the clerk of the court of appeals shall file it and shall immediately give notice to all parties of the date on which it was filed.

(c) *[Dismissal for failure of appellant to cause timely transmission or to docket appeal] [Abrogated]* (As amended Apr.1, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986.)

UNITED-GUARDIAN, INC.

Corporate Divisions and Subsidiaries
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TELECOMMUNICATIONS TRANSMITTAL SHEET

DATE: 2/03/92 TIME: 2.00

PLEASE DELIVER TO: Howard Scott

FROM: Ken Globus

MESSAGE

I have discussed your fax of 1/26 with Dr. Alfred Globus, Bob Rubinger, and Stan Fine, our Senior Vice President, and we are all in agreement that we would be happy to accomodate your request to have the agreement signed on the campus of Widener University if you would like to do so. Since we appreciate the trip you made to see us (especially in that bad weather!), we would be happy to return the favor. Of course, all of this assumes that we will be able to reach a final agreement based on the terms that we discussed, which we all feel confident we will be able to do. When we get to that point we will discuss with you when we might be able to get together.